No. 85-566

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IN THE

Supreme Court of the United States

OCTOBER TERM 1985

BRAXTON H. ANDERSEN, FRANK KENNETH BASINGER, PAMELA E. JOHNSON, PATRICIA L. MURPH, RICHARD B. PETERSON, SHIRLEY SHARP, ROBERT V. TUCKER, RONALD D. YOST, VERLINE BRYANT, SHARON DOVER, NORMA L. FANNING, JOY HARRIS, JOSEY JARRETT, EMMA JOHNSTON, ROBERT LEE KEATON, KATHY NEALEY, WALTER NEALEY, MICHAEL L. NYSTROM, ELBERT PAYNE, RUBY C. PAYNE, LOUETTA DAVIS RAYMOND and LOUIE A. HERMAN,

Petitioners,

v.

CIBA-GEIGY CORPORATION; EMPLOYEE BENEFIT PLAN OF CIBA-GEIGY CORPORATION; CORPORATE EMPLOYEE BENEFIT COMMITTEE, CIBA-GEIGY CORPORATION; ROBERT HOCHHAUSER, ROY W. LAWRENCE, GEORGE H. STEWART, DR. CHARLES E. ZIEGLER, WILLIAM H. EBERT, JOHN MINCY, MICHAEL WHELAN, STANLEY KASE, JOHN MULLINS, JOHN O'CONNOR and STANLEY SHERMAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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October 30, 1985

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QUESTION PRESENTED

Whether the court below correctly applied the "arbitrary and capricious" standard of review to CIBA-GEIGY's decision not to pay severance pay to former employees who continued their employment with the successor employer.

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners ask this Court to review a decision of the Court of Appeals for the Eleventh Circuit which upheld entry of summary judgment in favor of Respondents on Petitioners' claim for severance pay arising from the sale of the business

unit in which Petitioners were employed. Petitioners contend that the decision below is erroneous and that it conflicts with a decision of the Ninth Circuit Court of Appeals. As discussed more fully herein, however, the Eleventh Circuit's decision is correct and consistent with all applicable case law, including that of the Ninth Circuit. The petition for a writ of certiorari should be denied.

A. The Sale Of The REN Telecommunications Group

CIBA-GEIGY Corporation ("CIBA-GEIGY")[1] is composed of several operating divisions in the United States. Prior to July 21, 1981 one of those divisions contained the REN Telecommunications Group headquartered in Atlanta, Georgia. On July 21, 1981 most of REN's assets were sold to Communications Technology Corporation ("CTC") as a going concern. The purchase agreement provided that CTC would offer continued employment to CIBA-GEIGY employees listed in a schedule attached to the agreement.

All Petitioners were CIBA-GEIGY employees who continued in their same or similar positions with CTC after July 21, 1981 without reduction in their wages.

Employees not offered employment by CTC received severance pay in accordance with CIBA-GEIGY's severance pay policy; Petitioners, who continued in employment without interruption, did not.

B. CIBA-GEIGY's Severance Pay Policy And Its Application To The REN Divestiture

The termination pay policy for salaried employees maintained by CIBA-GEIGY in 1981 was intended to bridge the

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[1] As required by Rule 28.1 Respondents note that 100% of the stock of Respondent CIBA-GEIGY Corporation is owned by CIBA-GEIGY International Ltd., a Swiss corporation, and CIBA-GEIGY, Ltd., a Swiss corporation. Ilford, Inc. and Mettler Instruments Corporation are affiliates of CIBA-GEIGY Corporation.

economic gap caused by loss of employment as a form of unemployment compensation.[2]

In general, the policy provides for or denies benefits depending upon the reason for termination of employment. Employees terminated for reasons other than cause normally are entitled to two weeks' pay for each year of Company service. However, Section 2.9.2 of the policy states:

> This policy shall not be applicable in any special situation (such as the relocation of a major Operating Unit) where the Corporate Management Committee deems it necessary to establish a separate policy applicable to that situation only (A. 3).[3]

CIBA-GEIGY also maintains an employee handbook which contains a section on Termination of Employment summarizing the corresponding formal personnel policies. The handbook specifically states that "in special situations, such as a mass move of an operating unit, a separate policy covering terminations and severance payments will be established." These handbooks were distributed to employees and almost all Petitioners received them (A. 15).

The decision to deny severance benefits to those who continued in employment with CTC was made by CIBA-GEIGY's New York management. The Executive Committee (successor to the Corporate Management Committee referred

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[2] However, under normal circumstances, the Company did not disqualify persons who found other employment if otherwise eligible. The absence from CIBA-GEIGY's policy of an express exception for situations in which an otherwise eligible employee has found other employment does not alter the purpose of the policy. In normal circumstances, a terminated employee does not know whether, if ever, he will be reemployed. Such an exception would be difficult or impossible to administer and would create an undesirable disincentive to former employees who should be actively seeking new jobs. See also *Holland* v. *Burlington Industries, Inc.*, ____ F.2d____, 6 E.B.C. 2129, 2136 (4th Cir. 1985).

[3] References to "A. ____" and "B. ____" are to pages in Appendices A and B to the petition for a writ of certiorari.

to in the termination policy) delegated authority to Dr. Schneller, President of the operating division, to divest REN, including the necessary authority to apply the termination and severance benefit policy. Schneller, in turn, delegated his authority to apply the severance pay and other personnel policies to Stanley Kase, the division's Director of Human Resources (A. 10).

Kase exercised this delegated authority, determining that the Petitioners and all other employees who continued their employment with CTC were not entitled to receive severance pay. He believed that the divestiture of REN constituted a "special situation" of the type which Section 2.9.2 expressly excepted from the termination policy's general provisions (A. 4-A. 5).

This application of the policy was consistent with its application to other CIBA-GEIGY divestitures. In all these situations, severance pay has not been paid to employees who continued in employment with the successor (A. 14).

C. Proceedings In The District Court And The Court Of Appeals

On January 18, 1983, Petitioners commenced this action for severance benefits in the District Court for the Northern District of Georgia seeking severance pay under the Company's termination policy. Jurisdiction was based on the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1132(e)(1).

On February 15, 1984, Petitioners and Respondents filed cross-motions for summary judgment. On April 26, 1984 the District Court granted Respondents' motion and denied Petitioners' motion because, under the controlling legal standard, Respondents "did not act arbitrarily and capriciously in denying severance pay to Plaintiffs" (B. 20).

On appeal to the Eleventh Circuit, Petitioners changed the focus of their argument. Although they had argued below that Respondents' severance pay decision was arbitrary and capricious, on appeal they argued primarily that the arbitrary and capricious standard of review did not apply because Respondents allegedly violated some ERISA procedural requirements.

On May 8, 1985, the Eleventh Circuit affirmed. The court rejected Petitioners' argument that procedural errors in the management of an ERISA plan require application of something other than the arbitrary and capricious standard of review (A. 7-A. 8). After examining Petitioner's various arguments, including allegations of non-compliance with ERISA procedures, the court concluded there was no evidence to establish that Kase's decision was arbitrary, capricious or in bad faith (A. 14-A. 15).

Petitioners filed a Petition for Rehearing and Suggestion for Rehearing En Banc on May 28, 1985. It was denied on July 1, 1985.

REASONS FOR DENYING THE WRIT

A. The Court Of Appeals Correctly Identified And Resolved The Issues In This Case Based On Well Established Law.

It is settled law that the "arbitrary and capricious" standard, applied by the Eleventh Circuit to review the denial of severance pay here, is the proper standard for judicial review of benefit determinations under ERISA. Pursuant to this standard, Petitioners must show that Respondents acted arbitrarily, capriciously or in bad faith in failing to pay them severance benefits. See, *e.g., Griffis* v. *Delta Family-Care Disability,* 723 F.2d 822, 825 (11th Cir.) *cert. denied,* 104 S.Ct. 3514 (1984); *Martinez* v. *Swift & Co.,* 656 F.2d 262 (7th Cir. 1981); *Bayles* v. *Central States, Southeast & Southwest Areas Pension Fund,* 602 F.2d 97, 99 (5th Cir. 1979).

Indeed, Petitioners concede that this is the established standard of review in such cases (Petition, p. 22).

This standard requires a court to enforce the decision of a plan administrator or trustee "even though the court may disagree with it, so long as the decision is not arbitrary or capricious" or made in bad faith. *Sharron* v. *Amalgamated Ins. Agency Services, Inc.,* 704 F.2d 562, 564 (11th Cir. 1983). In applying this standard, courts recognize that:

> "[the] judicial role is limited to determining whether the [committee's] interpretation was made rationally and in good faith—not whether it was right." *Riley* v. *MEBA Pension Trust,* 570 F.2d 406, 410 (2nd Cir. 1977). Thus, the [committee's] interpretation of the intent or meaning of the provisions of the [benefit plan] need not be the best possible decision, only one with a rational justification." *Griffis* v. *Delta Family-Care Disability, supra* at 825.

The Eleventh Circuit applied this standard and affirmed the District Court's order for a number of reasons (A. 12-A.

17). First, the court noted that CIBA-GEIGY's interpretation of the termination policy to deny severance pay was a "fair reading" based on the "special situation" language of Section 2.9.2 and the fact that Petitioners kept their jobs at full pay (A. 14). Second, the court found that CIBA-GEIGY's interpretation of the plan was consistent with its application in other divestiture situations and stated that "nothing in the record indicates Kase acted in anything but good faith" (A. 14-A. 15). Third, the court found that the employee handbook provision summarizing Section 2.9.2, as well as a January 1981 memo, put the Petitioners on notice that they might not receive severance benefits (A. 15-A. 16). Finally, the court ruled that Petitioners "have presented no evidence sufficient to establish that Kase's decision to deny severance pay was arbitrary or capricious" (A. 17).

Although Petitioners argued that the arbitrary and capricious standard should not apply due to Respondent's noncompliance with various ERISA procedures, the Court of Appeals found no evidence of any such alleged violations. Moreover, as the court stated, "there is simply no authority for the proposition that procedural errors in an ERISA plan's management requires something other than the arbitrary and capricious standard of review" (A. 7).[4] Indeed, the Fourth Circuit recently expressly rejected the same argument presented by Petitioners here in a closely analogous severance pay case. The Fourth Circuit applied the arbitrary and capricious standard and upheld the denial of severance pay. *Holland* v.

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[4] Even *Blau* v. *Del Monte Corp.*, 748 F.2d 1348 (9th Cir.) *cert. denied*, 54 U.S.L.W. 3227 (Oct. 7, 1985), heavily relied upon by Petitioners, applied the arbitrary and capricious standard to review a severance pay determination despite its findings of wholesale ERISA procedural violations. See *infra* at p.11. The court of appeals simply noted that it was *not* passing on whether the arbitrary and capricious standard was the only standard that might be applied. *Id.* at 1352-1353.

Burlington Industries, Inc., ____ F.2d ____, 6 E.B.C. 2129, 2135-2136 (4th Cir. 1985).

The Eleventh Circuit's decision is further supported by other decisions in which federal courts have denied severance pay claims in remarkably similar situations. See *Jung* v. *FMC Corp.*, 755 F.2d 708 (9th Cir. 1985); *Sly* v. *P.R. Mallory & Co., Inc.*, 712 F.2d 1209 (7th Cir. 1983); *Dhayer* v. *Wierton Steel Division*, 571 F.Supp. 316 (N.D. W.Va.), *aff'd*, 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 104 S.Ct. 2387 (1984); *Rynar* v. *CIBA-GEIGY Corp.*, No. 82 C 2866, slip op. (N.D. Ill. June 30, 1983); *Pabst Brewing Co.* v. *Anger*, 610 F. Supp. 214 (D. Minn. 1985).

As these cases show, the lower courts are uniformly and correctly applying the arbitrary and capricious standard to the facts and plan language on a case-by-case basis. The Eleventh Circuit's decision is consistent with these other decisions and, contrary to Petitioner's contention (Petition, p. 22), presents this Court with no important questions to review.

At bottom this remains a dispute over the interpretation of CIBA-GEIGY's policy and Petitioners are simply engaged in one final attempt to change a Company decision they do not like. The court below correctly applied the appropriate standard in reviewing that decision on its facts.

B. The Questions Presented By Petitioners Are Not Properly Raised In This Case.

In their phrasing of the questions presented and throughout their petition for a writ of certiorari, Petitioners claim that CIBA-GEIGY disavowed its ERISA obligations and violated ERISA's procedural requirements with respect to the termination policy (Petition pp. i, 9-11, 14, 17, 20, 28). These contentions are at the heart of the Petition but they find no support in the record.

There is no evidence that CIBA-GEIGY disavowed its ERISA obligations or otherwise violated ERISA's procedural requirements.[5] Neither the District Court nor the Eleventh Circuit made any such finding. Indeed, the record evidence shows that CIBA-GEIGY substantially complied with the requirements which Petitioners assert were violated.

Despite Petitioners' claim that CIBA-GEIGY violated 29 U.S.C. § 1022, concerning the content of the summary plan description, undisputed record evidence establishes that the CIBA-GEIGY handbook fairly summarized the severance pay policy. Without repeating plan terms verbatim, the handbook sections specifically put employees on notice that a different severance policy may apply in special circumstances (A. 15). Moreover, the handbook contained a statement of ERISA rights, a claims procedure and other information regarding benefit plan administration in general.

Repondents also substantially complied with 29 U.S.C. § 1102. Although the personnel policy did not specifically name any person to act as a fiduciary to administer the severance policy, the statute contemplates such an omission by providing that the plan sponsor shall be deemed plan administrator if no administrator is named. 29 U.S.C. § 1002(16)(A). CIBA-GEIGY, as plan sponsor, was a fiduciary under the statute. Other Respondents also were and acted as fiduciaries; they were sued as such by Petitioners.

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[5] Petitioners contend that CIBA-GEIGY disavowed its ERISA obligations because it initially took the position that its unfunded severance pay program was not subject to ERISA. In light of the fact that Courts of Appeals have continued to pass on this issue even after this case was argued in the Eleventh Circuit, it was not unreasonable for CIBA-GEIGY to take this position in 1983. See *Gilbert* v. *Burlington Industries, Inc.*, 765 F.2d 320, 325 (2d Cir. 1985); *Scott* v. *Gulf Oil Corp.*, 754 F.2d 1499, 1502-03 (9th Cir. 1985); *Holland* v. *Burlington Industries, Inc.*, ____ F.2d ____, 6 E.B.C. 2129, 2131 (4th Cir. 1985). Moreover, as shown *infra* CIBA-GEIGY substantially complied with ERISA's procedural requirements.

In addition, Petitioners erroneously contend that the normal standards should not apply because the decision-maker, Kase, was not a named fiduciary or did not believe that CIBA-GEIGY's termination policy was governed by ERISA. Fiduciary accountability under ERISA is based upon conduct, not belief or nomenclature. See 29 U.S.C. § 1002(21)(A); see also *Eaves* v. *Penn*, 587 F.2d 453, 458-59 (10th Cir. 1978); *Donovan* v. *Williams*, 4 E.B.C. 1237 (N.D. Ohio 1983); *Fulk* v. *Bagley*, 88 F.R.D. 153, 161-162 (M.D.N.C. 1980); *Freund* v. *Marshall and Illsley Bank*, 485 F.Supp. 629, 635 (W.D. Wis. 1979).

Because Kase was acting with discretion and authority concerning management and administration of a plan, he *was* a fiduciary; he was charged with fiduciary duties under ERISA; and his actions should be reviewed under the applicable standard—the arbitrary and capricious standard. See, *e.g.*, *Challenger* v. *Local Union No. 1 of International Bridge, Structural and Ornamental Iron Workers, AFL-CIO*, 619 F.2d 645, 649 (7th Cir. 1980); *Fentron Industries* v. *Nat. Shopmen Pension Fund*, 674 F.2d 1300, 1307 (9th Cir. 1982).

Finally, assuming *arguendo* that Respondents failed to comply with certain of ERISA's procedural requirements, this does not mean, as Petitioners argue, that the proper remedy is to suspend the arbitrary and capricious standard. Such a result is particularly inappropriate where Petitioners have not shown harm or prejudice resulting from the alleged procedural violations.[6]

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[6] In the absence of such a showing, courts in analogous circumstances have refused to award statutory penalties provided by ERISA for procedural violations. See, *e.g.*, *Scholmchik* v. *Retirement Plan of the Amalgamated Insurance Fund*, 502 F.Supp. 240, 245 (E.D. Pa. 1980), *aff'd*, 671 F.2d 496 (3rd Cir. 1981); *Adams* v. *Western Conference of Teamsters Pension Plan*, 484 F.Supp. 933, 935 (D. Utah, 1979); *Pollock* v. *Castrovinci*, 476 F.Supp. 606, 618 (S.D. N.Y. 1979), *aff'd*, 622 F.2d 575 (2d Cir. 1980).

In sum, even assuming that procedural infirmities can ever eviscerate or substantially modify the arbitrary and capricious standard of review under ERISA, the Eleventh Circuit properly refused to do so here because Respondents substantially complied with their statutory obligations.

C. The Decision Below Is Consistent With *Blau* v. *Del Monte Corp.*

Petitioners erroneously contend that the Eleventh Circuit's decision is in conflict with the Ninth Circuit's decision in *Blau* v. *Del Monte Corp.*, 748 F.2d 1348 (9th Cir.), *cert. denied*, 54 U.S.L.W. 3227 (Oct. 7, 1985) (Petition p. 23-24). In *Blau* the court applied the arbitrary and capricious standard to reverse a summary judgment in favor of a plan administrator which had denied claims for severance pay. As the Eleventh Circuit expressly held, however, *Blau* is distinguishable from this case (A. 17).

First, the *Blau* severance policy contained no provision like Section 2.9.2 of CIBA-GEIGY's plan which expressly excepted "special situations" from coverage.

Second, the *Blau* court found that Del Monte actively concealed the severance plan from its employees. In contrast, the CIBA-GEIGY policy was summarized in an employee handbook which was distributed to Petitioners.

Finally, the *Blau* court found that Del Monte "flouted" ERISA's provisions in a "wholesale and flagrant" manner. *Id.* at 1353. Here the record evidence established that CIBA-GEIGY substantially complied with all ERISA requirements.

Plainly, there is no conflict among the circuit courts of appeals.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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